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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re B.T., a Person Coming Under the  
Juvenile Court Law.

B210122

(Los Angeles County  
Super. Ct. No. CK72132)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ERICKA T.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn Mordetzky, Juvenile Court Referee. Affirmed.

Roland Koncan, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Aleen L. Langton, Senior Deputy County Counsel, for Plaintiff and Respondent.

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Ericka T., the mother of B.T., born in August 2005, M.T., born in December 2006, and E.T., born in March 2008, appeals from the juvenile court's disposition order removing the children from her custody pursuant to Welfare and Institutions Code section 361,<sup>1</sup> after declaring them dependents of the court pursuant to section 300, subdivision (b), contending the decision to remove the children was not supported by substantial evidence. We conditionally affirm the order but remand for compliance with the notice provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA).

### **FACTUAL AND PROCEDURAL BACKGROUND**

On June 16, 2008 the Los Angeles County Sheriff's Department responded to two domestic violence calls made by Ignace T., the father of B.T., M.T. and E.T. After deputies arrived at the family's Lancaster apartment, both Ericka T. and Ignace T. claimed to be the victim of domestic abuse -- each said the other spouse had been the aggressor and had pushed him or her. Neither Ericka T. nor Ignace T. had any injuries. The children, all under three years old, were present during the incident. Both parents were arrested on misdemeanor domestic violence charges. The three young children were taken into protective custody, and the Los Angeles County Department of Children and Family Services (Department) was notified.

According to the police report, this was the fourth time law enforcement had responded to the home in response to domestic violence calls. The family also had several prior inconclusive referrals to the Department for domestic violence and had previously agreed to participate in voluntary services.

The Department filed a petition pursuant to section 300, subdivisions (a) (serious physical harm) and (b) (failure to protect), alleging that Ericka T. and Ignace T. have a history of engaging in violent physical altercations in the children's presence, identifying Ignace T. as the aggressor, and that Ericka T. has failed to protect the children by allowing Ignace T. to continue to reside in the home and by failing to obtain restraining

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

orders against Ignace T. The children were ordered detained at a hearing on June 19, 2008. On July 10, 2008 Ericka T. and Ignace T. stipulated to mutual stay-away orders.

In a series of reports submitted prior to the jurisdiction and disposition hearing, the Department advised the court that Ignace T. had beaten Ericka T. on several occasions in 2006 and 2007. The domestic violence was described as on-going. Ericka T. had obtained temporary restraining orders against Ignace T. on at least two occasions, but then violated their terms by allowing him back in the family home. Neither Ericka T. nor Ignace T. denied the past and present physical altercations, but each claimed the other had initiated the violence. Ericka T. acknowledged she should have left Ignace T. in the past, but believed him when he said he would stop abusing her. Ericka T. told the social worker she needed to divorce Ignace T. and move closer to her family. After the children were detained, she completed a petition for dissolution of marriage, enrolled in a domestic violence program and completed a parenting program.

The juvenile court began contested jurisdiction and disposition hearings on August 4, 2008. Ericka T. testified she had taken steps to separate herself from Ignace T. by complying with the stay-away orders, petitioning for dissolution of the marriage and having no contact with Ignace T. Ericka T. admitted she had been involved in approximately 10 domestic violence incidents with Ignace T. and said law enforcement had been called on three or four of those occasions. She also testified she had learned about the cycle of violence in her domestic violence classes, indicated her awareness that she was participating in such a cycle and acknowledged she had never sought to make temporary restraining orders against Ignace T. permanent, instead allowing him back in the home after three to five days. The Department's social worker testified Ericka T. was very motivated and was benefiting from the programs she was attending. However, he remained concerned about the risk to the children if Ericka T. once again allowed Ignace T. to return to the home.

Based on the parties' agreement to amended language in the petition and the evidence submitted, including the Department's reports, at the continued jurisdiction and disposition hearing on August 12, 2008, the court dismissed the section 300, subdivision

(a) count without prejudice and sustained the section 300, subdivision (b) count, as amended, finding Ericka T. and Ignace T. have a history of engaging in violent verbal and physical altercations in the children's presence and have failed to protect the children by continuing to reside together and failing to obtain and serve restraining orders. "Such domestic violence and the failure to protect the children endanger the children's physical and emotional health and safety and places the children at risk of harm."

Proceeding to disposition the court found by clear and convincing evidence that a substantial danger existed to the children if they were returned home and also found reasonable efforts had been made to prevent or eliminate the need for the children's removal. The court ordered Ericka T. to complete a parenting program and to attend domestic violence counseling and individual counseling to address codependency issues. The court ordered monitored visits for both parents, with discretion in the Department to liberalize visitation.

In response to Ericka T.'s argument the children could safely be allowed home with family preservation services and unannounced visits by a social worker, the court found it would not be in the children's best interest to return home at this time. "The mother needs to make more progress in her programs . . . . The fact that she's not living under the same roof [as Ignace T.] doesn't mean that those codependency issues don't still exist, which I believe they do." The court acknowledged Ericka T.'s participation in counseling set the matter for a progress report to address liberalization of visits and possible return of the children to Ericka T.

At subsequent progress hearings held over the next several months the court first permitted Ericka T. to have unmonitored day visits with the children with Department discretion to allow overnight visits, then authorized overnight and weekend visits and finally ordered unmonitored overnight and weekend visits, at the same time granting the Department discretion to release the children to Ericka T.<sup>2</sup> At the six-month reviewing

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<sup>2</sup> This court has given the parties notice of its intent to take judicial notice of the minute orders filed after the progress hearings held on September 23, 2008, November 6,

hearing held pursuant to section 366.21, subdivision (e), on February 10, 2009, the court ordered the children returned to Ericka T. under the supervision of the Department in a home-of-parent order.<sup>3</sup>

## **CONTENTIONS**

Ericka T. contends the juvenile court lacked substantial evidence to support its findings there would be a substantial danger to her children's health and safety if they were returned to her care and no reasonable means existed to protect the children without removing them from her home. She also contends the court erred in proceeding with the disposition hearing before satisfying the ICWA notice requirements.

## **DISCUSSION**

### *1. Standard of Review*

Section 361, subdivision (c)(1), permits removal of a child from his or her parent's custody only if the juvenile court finds by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being" of the child if the child is returned home and "there are no reasonable means by which the [child]'s physical health can be protected without removing" the child from his or her parent's custody.

We review the juvenile court's substantial danger findings for substantial evidence even when the burden of proof in the lower court is by clear and convincing evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762; *In re Joanna Y.* (1992) 8

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2008, November 10, 2008 and December 8, 2008, as well as the order filed following the six-month review hearing held on February 10, 2009 (§ 366.21, subd. (e)). Pursuant to Evidence Code section 452, subdivision (d), and 459, subdivision (a), we take judicial notice of those orders.

<sup>3</sup> Notwithstanding the order returning the children to Ericka T.'s care under the supervision of the Department, in light of the statutory limits on the duration of court-ordered family reunification services that may be provided to a child and his or her family, the court does not consider Ericka T.'s appeal from the disposition order of August 12, 2008 to be moot. (See § 361.5, subd. (a)(3), 4th par.; *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 308-309.)

Cal.App.4th 433, 439; see also *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 [“The ‘clear and convincing’ standard . . . is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] “The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.””].) We examine the whole record in the light most favorable to the findings and conclusions of the juvenile court and defer to that court on issues of weight of the evidence and credibility of witnesses. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1427 [“[W]e must defer to the trial court’s factual assessments. [Citation.] ‘We review a cold record and, unlike a trial court, have no opportunity to observe the appearance and demeanor of the witnesses.’”].) We determine only whether there is any substantial evidence, contradicted or uncontradicted, that supports the court’s order, resolving all conflicts in support of the determination and indulging all legitimate inferences to uphold the court’s order. Additionally, we may not substitute our deductions for those of the trier of fact. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re John V.* (1992) 5 Cal.App.4th 1201, 1212; *In re Eric B.* (1987) 189 Cal.App.3d 996, 1004-1005.)

*2. Substantial Evidence Supports the Juvenile Court’s Disposition Order Removing the Children from Ericka T.’s Custody*

According to the evidence presented at the contested disposition hearing, Ericka T. and Ignace T. had an extensive history of domestic violence, extending over their four year relationship, with a number of the incidents occurring in the presence of the children. Indeed, according to Ericka T. on one or two occasions she was holding a child when assaulted by Ignace T. The juvenile court recognized, as reported by the Department, that Ericka T. appeared motivated to change her role in the family cycle of domestic violence, but had attended only five domestic violence counseling sessions and no individual counseling by the time of the continued disposition hearing. Moreover, on

a number of prior occasions, Ericka T. had separated from Ignace T. following a domestic violence episode only to return to him a few days later.

Based on this evidence the juvenile court properly concluded Ericka T. had failed to protect the children, a jurisdiction finding not challenged by Ericka T. on appeal. Evaluating the credibility of Ericka T., as well as weighing the other evidence before it, the court also concluded Ericka T. still had significant codependency issues with Ignace T. that needed to be addressed before the children could safely be returned to her custody. This finding, grounded in the record and based on the court's continuing concern that Ericka, as she had in the past, would once again allow Ignace T. to return to the family home notwithstanding the stay-away orders and the petition for dissolution of the marriage, is supported by substantial evidence, as is the further finding that in-home services would not be sufficient to protect the children.

### *3. The Parties Agree Remand Is Necessary To Provide Proper ICWA Notice*

At the detention hearing on June 19, 2008 the Department reported the children may have American Indian ancestry, based on Ericka T.'s statement she is or may be a member of the Choctaw or Cherokee Tribes and Ignace T.'s indication he is or may be a member of the Choctaw or Houma Tribes. The court ordered the Department to provide notice to the tribes to determine if the case was governed by ICWA. The Department was also ordered to contact both maternal and paternal relatives with respect to the claim of Indian ancestry and to provide a further report to the court. At the July 17, 2008 pretrial resolution conference the Department reported it needed additional statistical information about the family before sending the ICWA notices.

By the contested jurisdiction and disposition hearing on August 4 and 12, 2008, ICWA notice had not been completed. The court ordered the Department to continue to investigate the claims of Indian ancestry and to file a progress report addressing the status of ICWA notice by September 23, 2008. Notwithstanding the failure to comply with ICWA notice requirements, the court completed the contested hearing and entered its jurisdiction findings and disposition orders. At the September 23, 2008 progress hearing the court expressly found that ICWA notice was not yet complete.

The Department concedes it failed to comply with the juvenile court's order and the statutory notification mandated by ICWA (25 U.S.C., § 1912(a)) had not been provided when the court issued its disposition orders. The Department further acknowledges this court should remand the matter and direct the juvenile court to fully comply with the notice requirements of ICWA if it has not already done so. To accomplish this limited remand, it is not necessary to reverse or vacate the juvenile court's disposition order. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385-386; accord, *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268; *In re Veronica G.* (2007) 157 Cal.App.4th 179, 188; but see *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 785.) After proper notice under ICWA, if it is determined that B.T., M.T. and E.T. are Indian children and ICWA applies to these proceedings, Ericka T. is entitled to petition the juvenile court to invalidate orders that violated ICWA. (See 25 U.S.C. § 1914; *In re Veronica G.*, at p. 188.)

#### **DISPOSITION**

The jurisdiction findings and disposition orders of the juvenile court are affirmed. The matter is remanded to the juvenile court for compliance with ICWA notification requirements and for further proceedings not inconsistent with this opinion.

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PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.